No. 16108

United States
Court of Appeals
for the Ninth Circuit

CORNELI SEED COMPANY, a corporation,
Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Idaho, Southern Division

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—8-25-58

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Agreed Statement of Facts 14

Exhibit A—Report and Order of the Interstate Commerce Commission Dated March 27, 1956 24

Answer to Complaint 9

Appeal:

Bond on 56

Certificate of Clerk to Transcript of Record on 59

Designation of Record on (USCA) 63

Notice of 55

Statement of Points on (USCA) 61

Appeal Bond 56

Certificate of Clerk to Transcript of Record ... 59

Complaint 3

Designation of Record To Be Printed (USCA) 63

Judgment 48

Memorandum of Costs and Disbursements 49

Memorandum Opinion 42

Minutes of Feb. 18, 1958—Order Matter Submitted on Briefs..... 42

Motion of Defendant for New Trial and to Amend Judgment 51

Names and Addresses of Attorneys..... 1

Notice of Appeal..... 55

Notice to Tax Costs..... 50

Order Denying Motion for New Trial and to Amend Judgment 55

Statement of Points To Be Relied Upon (USCA) 61

Stipulation and Order re Defendant to Plead.. 8

Stipulation and Order to Submit Motion for New Trial and to Amend Judgment on Briefs 53

Summons 7

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United States District Court, For The District of Idaho, Southern Division

Civil No. 3148

UNION PACIFIC RAILROAD COMPANY, a corporation, Plaintiff,

vs.

CORNELI SEED COMPANY, INC., a corporation, Defendant.

COMPLAINT

Comes now Union Pacific Railroad Company, a corporation, and for cause of action against the defendant alleges:

I.

That this action arises under the Interstate Commerce Act, Title 49 USCA 6, and jurisdiction is conferred under Title 28 USCA, Section 1337. That the Union Pacific Railroad Company is a corporation duly organized and existing under and by virtue of the laws of the State of Utah and authorized to transact business in the State of Idaho. That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Idaho and that the amount in controversy exceeds the sum of $3,000.00, exclusive of interest and costs.

II.

That the Corneli Seed Company, Inc., during February and March, 1953, delivered to the plaintiff at Twin Falls, Idaho, nine carloads of beans, peas or shelled corn for transportation to various

points outside the State of Idaho; that said shipments, showing initial and car numbers, date of shipment, consignee and destination, are as follows:—

GBW 778, Feb. 25, 1953—Corneli Seed Company, Inc., St. Louis, Mo.

CG 6568, Mar. 24, 1953—Illinois Canning Co., Fowler, Ind.

NYC 177634, Mar. 19, 1953—Rockfield Farms, Inc., Rockfield, Wisc.

Erie 86142, Mar. 17, 1953—Stokely-VanCamp, Inc., Columbus, Wisc.

CG 41065, Mar. 10, 1953—St. Mary's Packing Co., North Freedom, Wisc.

NYC 31350, Mar. 17, 1953—Stokely-VanCamp Inc., Columbus, Wisc.

T&P 40606, Mar. 14, 1953—Fox Valley Canning Company, Harborville, Wisc.

B&O 278828, Mar. 12, 1953—Riverside Truck & Storage Co., Bay City, Mich.

SP 101509, Mar. 9, 1953—Oostburg Canning Co., Oostburg, Wisc.

That said shipments were by the plaintiff and its connecting carriers transported from Twin Falls, Idaho, to the various destinations shown.

III.

That on April 15, 1953, the defendant filed with the plaintiff its claim for refund on each shipment of a portion of the transportation charges paid, asserting that as to each shipment transit privi-

leges should have been allowed, and which, if allowed, would materially reduce the rate charged and paid by the defendant. That on the basis of said claims the plaintiff made refunds to the defendant in June and July, 1953, in varying amounts on all shipments, and in the order said shipments are listed above said refunds were as follows:—

Freight Charges	Federal Tax	Total
$ 239.27	$ 7.18	$ 246.45
380.47	11.41	391.88
283.27	8.50	291.77
385.03	11.55	396.58
471.39	14.14	485.53
387.02	11.62	398.64
382.42	11.48	393.90
386.88	11.61	398.49
303.42	9.10	312.52
$3,219.17	$96.59	$3,315.76

IV.

That shortly after said refunds had been made plaintiff discovered that the defendant had not complied with the applicable tariff provisions relating to transit privileges, and that instead of recognizing defendant's claims said claims should have been declined. That said refunds are contrary to tariff provisions and were therefore erroneously made.

V.

That there is also due and owing the plaintiff from the defendant additional freight charges re-

sulting from erroneous application of the lawful tariff rate, as follows:—

On shipment loaded in Car CG 6568, additional freight charges of $7.38, and Federal Tax of 22c.

On shipment loaded in Car NYC 177634, additional freight charges of $132.77, and Federal Tax of $3.98.

On shipment loaded in Car B&O 278828, additional freight charges of 57c, and Federal Tax of 2c.

That on shipment loaded in Car T&P 40606 there was an overcharge made of freight charges in the amount of $16.70, and Federal Tax of 50c, which amounts when deducted from the foregoing undercharges, leaves a net balance due of $124.02, and Federal Tax of $3.72, in addition to the amount set forth in paragraph III above.

That there is now due and owing from the defendant the sum of $3,443.50, no part of which has been paid, although demand has been made upon the defendant to do so.

Wherefore, plaintiff prays judgment against the defendant in the sum of $3,443.50, with interest at the rate of 6% from the 2nd day of July, 1953, together with plaintiff's costs herein incurred.

/s/ BRYAN P. LEVERICH,
/s/ L. H. ANDERSON,
/s/ E. C. PHOENIX,
Attorneys for Plaintiff.

[Endorsed]: Filed January 19, 1955.

[Title of District Court and Cause.]

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Bryan P. Leverich, 10 South Main St., Salt Lake City, Utah; and L. H. Anderson and E. C. Phoenix, P. O. Box 530, Pocatello, Idaho, plaintiff's attorneys, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: January 19, 1955.

[Seal] ED. M. BRYAN,
Clerk of Court.

/s/ LONA MANSER,
Deputy Clerk.

Return On Service of Writ

I hereby certify and return, that on the 20th day of January, 1955, I received this summons and served it together with the complaint herein as follows: By showing the Original to and handing to and leaving a true and correct copy of Summons & Complaint thereof with Ralph R. Breshears, Mgr. Agent for Corneli Seed Company, Inc., a Corporation. This was done in room 309

Idaho Bldg. at 11:30 A.M. on January 20, 1955.
Marshal's Fees

SAUL H. CLARK,
United States Marshal.
/s/ By REX WALTERS,
Deputy United States Marshal.

Travel: None.
Service: $2.00.

$2.00

[Endorsed]: Filed January 24, 1955.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that the defendant in the above entitled case may have twenty days from and after a decision is rendered by the Interstate Commerce Commission upon a complaint filed with said Commission by the defendant requesting authority to waive some or all of the freight charges referred to in plaintiff's complaint.

Dated This 28th day of January, 1955.

/s/ BRYAN P. LEVERICH,
/s/ L. H. ANDERSON,
/s/ E. C. PHOENIX,
Attorneys for Plaintiff.
/s/ RALPH R. BRESHEARS,
Attorneys for Defendant.

ORDER

Upon reading the above stipulation, good cause appearing therefor, It Is Ordered that the defendant herein may have twenty days from and after the decision of the Interstate Commerce Commission in which to plead to the complaint herein.

Dated This January 28, 1955.

/s/ FRED M. TAYLOR,
District Judge.

[Endorsed]: Filed January 28, 1955.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT CORNELI SEED COMPANY, INC.

Now comes the defendant Corneli Seed Company, Inc. and for its answer to plaintiff's complaint states as follows:

I.

Defendant admits so much of paragraph I of plaintiff's complaint as alleges that plaintiff is a corporation duly organized and existing under the laws of the State of Utah and authorized to transact business in the State of Idaho, that defendant is a corporation organized and existing under the laws of the State of Idaho, and that the amount in controversy exceeds the sum of $3,000.00 exclusive of interest and costs; and defendant denies all other allegations of said paragraph I.

For further answer to paragraph I, defendant

states that jurisdiction is conferred under Title 28 USCA, Section 1332, in that plaintiff and defendant are citizens of different states and the matter in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs.

II.

Defendant admits the averments of paragraph II of plaintiff's complaint, and for further answer thereto states that said shipments were transit shipments and so recorded by plaintiff on their arrival at Twin Falls, Idaho, from their respective points of origin; that said shipments were forwarded by plaintiff to their final destinations, as specified in plaintiff's complaint, all in accordance with a course of claim procedure and settlement previously established between plaintiff and defendant and then and there in force and effect, all as hereinafter more particularly set out.

III.

Defendant admits the averments of paragraph III of plaintiff's complaint, and for further answer thereto states that said claim was filed by defendant and paid by plaintiff in recognition of and in accordance with the course of claim procedure and settlement previously established between plaintiff and defendant and then and there in force and effect, all as hereinafter more particularly set out.

IV.

Defendant denies the averments of paragraph IV of plaintiff's complaint.

V.

Defendant admits so much of paragraph V of plaintiff's complaint as alleges that it owes plaintiff additional freight charges and taxes in the net aggregate amount of $127.74 resulting from erroneous application of the applicable tariff rates on the four shipments specified in said paragraph V but defendant denies each and every other averment contained in said paragraph V.

VI.

For its further answer, defendant states as follows:

(A) That at all times mentioned in plaintiff's complaint and for a long time prior thereto, defendant has been engaged in the business of processing and wholesaling seed; that in the course of said business defendant purchased seed from producers located within and without the State of Idaho and caused such seed to be transported by plaintiff and its connecting carriers to Twin Falls, Idaho, where said seed was stopped in transit for cleaning and processing by defendant, and then forwarded by plaintiff and its connecting carriers to defendant's customers; that such shipments are known as transit shipments and as such are entitled to the plaintiff's single factor transit rates; that plaintiff's rules and regulations specify that the outgoing bills of lading of such transit shipments should, among other things, indicate the place of origin of the seeds shipped; that from 1944 to 1949 the outgoing bills of lading of such shipments so indicated the

origin of such seed; that by reason of such notations on the outgoing bills of lading, defendant's customers ascertained and determined defendant's sources of supply and thereupon purchased their requirements directly, thereby depriving defendant of valuable business; that commencing in 1949, representatives of plaintiff and of defendant agreed or at least pursued a course of claim procedure and settlement with respect to such transit shipments which would not require notation on outgoing bills of lading of the points of origin of the seeds shipped; that said course of claim procedure and settlement called for defendant to pay the transportation charges for shipments into and out of Twin Falls, Idaho, at the full rates and then to file claims for refund of the excess so paid over the transit rates, furnishing with such claims information as to points of origin of the shipments; that plaintiff and defendant followed such course of claim procedure and settlement from 1949 to December 15, 1953 at which time plaintiff notified defendant that subsequent investigation of the claims on which plaintiff had made refunds in June and July, 1953 (as alleged in paragraph V of the complaint herein) had developed that the basis of claim settlement was not applicable because of non-compliance with transit rules and requested that the refunds which had been made be returned.

(B) That the shipments mentioned in paragraph II of plaintiff's complaint and on which refunds were made as alleged in paragraph III of the

complaint were recorded for transit by plaintiff on arrival at Twin Falls, Idaho, prior to their forwarding as described in plaintiff's complaint; that said shipments were entitled to plaintiff's single factor transit rates; that defendant made claims for the transit rate and plaintiff honored the same, all in accordance with the course of claim procedure and settlement alleged in section (A) above.

(C) That the shipments mentioned in plaintiff's complaint were in truth and fact transit shipments and were so known to be by plaintiff at the time it paid defendant's claims for refund of the amounts paid by defendant in excess of the transit rate.

Wherefore, having made full answer to plaintiff's complaint, defendant prays that the prayer of plaintiff's complaint except to the extent of $127.74 as to which amount defendant admits liability be denied and plaintiff's action except as to said $127.74 be dismissed, and that defendant be discharged without costs.

/s/ RALPH R. BRESHEARS,
GREENSFELDER, HEMKER & WIESE,

/s/ By EDWARD L. WIESE,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 11, 1957.

[Title of District Court and Cause.]

AGREED STATEMENT OF FACTS

It Is Hereby Stipulated and Agreed by and between the parties hereto through their respective counsel:

I.

That this action arises under the Interstate Commerce Act, Title 49 USCA 6, and jurisdiction is conferred under Title 28 USCA, Section 1337, and also under Title 28 USCA, Section 1332, in that the Union Pacific Railroad Company is a corporation duly organized and existing under and by virtue of the laws of the State of Utah and authorized to transact business in the State of Idaho. That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Idaho and that the amount in controversy exceeds the sum of $3,000.00, exclusive of interest and costs.

II.

That defendant since at least January 5, 1944 and up to and including December 15, 1953, has been engaged in the business of processing and wholesaling seeds, including shelled corn, dried beans and peas; that in the course of said business defendant purchased seeds from various growers, producers and processors at points in California, Idaho, Oregon and Washington; that defendant caused such seeds to be shipped in carload lots from their respective points of origin, by plaintiff and its connecting carriers, to Twin Falls, Idaho, where

they were stopped in transit and subsequently forwarded, at defendant's instructions, by plaintiff and its connecting carriers to destinations in Florida, Indiana, Michigan, Missouri, New York, Tennessee, and Wisconsin; that said seeds were stopped in transit at Twin Falls, Idaho, to permit defendant to clean and otherwise process the same at its plant in Twin Falls, Idaho.

III.

That the rules and regulations of the transit tariff of the plaintiff applicable to the shipments involved herein provided that when shipments are forwarded from the transit station, in this case Twin Falls, Idaho, unexpired inbound freight bills which had been recorded, or tonnage credit slips must be surrendered and cancelled; that the outbound bills of lading or shipping orders must have inserted thereon the weight, point of origin, and date of each inbound shipment covering the commodities forwarded and that the transit rate would not apply if shippers fail or decline to comply with all such rules and regulations; that the combination of rates from points of origin of defendant's seeds to Twin Falls, Idaho, and from Twin Falls, Idaho, to points of final destination, exceeded the respective single-factor through rates from points of origin to points of destination plus the applicable transit charge; that the through or single-factor transit rate was a less expensive method for defendant to ship its seeds.

IV.

That for several years beginning at least as early as January 5, 1944, the defendant complied with the tariff provision above stated and obtained the benefit of the transit or single-factor rates; that compliance with said tariff in part required notation on the outbound bills of lading forwarded to defendant's customers of the points of origin of the seeds sold by defendant to those customers and thus enabled those customers to ascertain and locate defendant's producers and sources of supply and to purchase from them direct, with a consequent loss of business to defendant; that in order to effect discontinuance of this practice by defendant's customers, sometime in January or February, 1949, the local representative of defendant adopted and thereafter pursued a practice of making shipments out of the transit point (Twin Falls, Idaho) by using the regular forms of bill of lading which are used for shipments not entitled to transit privileges and which did not show the information previously shown in compliance with the transit tariff and then filed with the plaintiff overcharge claims attached to which were copies of the bill of lading for the outbound shipment, a memorandum bill marked "for transit consideration only" which contained inbound references, and a statement showing a computation of the difference between the transit rate and the combination rate, that is to say, such claims were for the difference between the transit or through single-factor rate from original point of shipment to final destination, and the

combination of the rate from original point of shipment into Twin Falls, Idaho, and the rate from Twin Falls, Idaho, to destination, the combination rate being the greater; that thereafter plaintiff paid claims so submitted which had the result of making the effective rate of defendant's true transit shipments exactly what plaintiff's transit tariff authorized. Defendant's local representative at Twin Falls, Idaho, who adopted and pursued the practice of making shipments and filing claims as above set forth was not informed as to all of the rules and regulations of the applicable transit tariff nor did he have the ability to interpret said tariff, and at no time was he informed by plaintiff's representatives at Twin Falls, Idaho, that the practice and procedure which he had adopted was not proper or adequate, and at no time did said representatives of plaintiff object to said practice or the claims filed, nor did they inform said local representative of defendant that provisions of the transit tariff were not being complied with; and that said conditions continued to obtain until the nine shipments detailed in paragraph V hereof.

V.

That the Corneli Seed Company, Inc., during February and March, 1953, delivered to the plaintiff at Twin Falls, Idaho, nine carloads of beans, peas or shelled corn for transportation to various points outside the State of Idaho; that said shipments, showing initial and car numbers, date of shipment, consignee and destination, are as follows:

GBW 778, Feb. 25, 1953—Corneli Seed Company, Inc., St. Louis, Mo.

CG 6568, Mar. 24, 1953—Illinois Canning Co., Fowler, Ind.

NYC 177634, Mar. 19, 1953—Rockfield Farms, Inc., Rockfield, Wisc.

Erie 86142, Mar. 17, 1953—Stokely-VanCamp, Inc., Columbus, Wisc.

CG 41065, Mar. 10, 1953—St. Mary's Packing Co., North Freedom, Wisc.

NYC 31350, Mar. 17, 1953—Stokely-VanCamp, Inc., Columbus, Wisc.

T&P 40606, Mar. 14, 1953—Fox Valley Canning Company, Harborville, Wisc.

B&O 278828, Mar. 12, 1953—Riverside Truck & Storage Co., Bay City, Mich.

SP 101509, Mar. 9, 1953—Oostburg Canning Co. Oostburg, Wisc.

That said shipments were by the plaintiff and its connecting carriers transported from Twin Falls, Idaho, to the various destinations shown.

VI.

That on April 15, 1953, the defendant filed with the plaintiff its claim for refund on each shipment of a portion of the transportation charges paid, asserting that as to each shipment the transit, or single factor rate should have been applied, and which, if used, would reduce the combination rate charged and paid by the defendant. That on the basis of said claims the plaintiff made refunds to

the defendant in June and July, 1953, in varying amounts on all shipments, and in the order said shipments are listed above said refunds were as follows:

Freight Charges	Federal Tax	Total
$ 239.27	$ 7.18	$ 246.45
380.47	11.41	391.88
283.27	8.50	291.77
385.03	11.55	396.58
471.39	14.14	485.53
387.02	11.62	398.64
382.42	11.48	393.90
386.88	11.61	398.49
303.42	9.10	312.52
$3,219.17	$96.59	$3,315.76

VII.

That on four of the shipments referred to in paragraph V hereof there was an erroneous application of the lawful tariff rate, resulting in undercharges on three of the shipments and an overcharge on another, as follows:

On shipment loaded in car CG 6568, additional freight charges of $7.38, and Federal Tax of 22c.

On shipment loaded in Car NYC 177634, additional freight charges of $132.77, and Federal Tax of $3.98.

On shipment loaded in Car B&O 278828, additional freight charges of 57c, and Federal Tax of 2c.

On shipment loaded in Car T&P 40606 there was an overcharge made of freight charges in the amount of $16.70, and Federal Tax of 50c, which amounts when deducted from the undercharges on the first three shipments referred to in this paragraph leaves a net balance due of $124.02, and Federal Tax of $3.72, and defendant admits that it is indebted to plaintiff in said total amount of $127.74.

VIII.

That as to each of said nine shipments detailed in paragraph V hereof transit rates were available and allowable under the applicable and lawful transit tariff, if the rules and regulations contained in said transit tariff had been complied with by the defendant at the time each shipment was made from Twin Falls, Idaho; application of said transit tariff rate would entitle defendant to net refunds of $3,188.02, the excess of the amount of $3,315.76 which were actually refunded over $127.74 admitted by defendant to be due plaintiff.

IX.

That defendant in making the nine shipments detailed in paragraph V hereof and in filing the claims for refund detailed in paragraph VI hereof followed exactly the same procedure of making shipments and filing claims which defendant had adopted and pursued since sometime in January or February, 1949, as detailed in paragraph IV hereof.

X.

That on or about December 15, 1953, the plaintiff concluded that the defendant had not complied with the applicable tariff provisions relating to transit privileges at Twin Falls, Idaho, and that instead of recognizing and paying defendant's claims as it had done on the shipments referred to in paragraph V hereof that it should have declined said claims and accordingly made demand on the defendant for repayment of the amounts refunded by plaintiff to the defendant on the nine shipments as detailed in paragraphs V and VI hereof. Defendant declined this demand and upon further demand by the plaintiff and advice that suit would be instituted to enforce collection the defendant advised plaintiff that proceedings were to be instituted before the Interstate Commerce Commission to determine the applicability, reasonableness and lawfulness of the charges upon which the within action was based.

XI.

That thereafter, and on October 1, 1954. the defendant, Corneli Seed Company, Inc., filed a complaint with the Interstate Commerce Commission against the plaintiff herein, Union Pacific Railroad Company, and other connecting carriers transporting the shipments herein referred to, which complaint was designated as "No. 31639, Corneli Seed Company, et al., vs. Atlantic Coast Line Railroad Company, et al."; that said complaint challenged the application of the rates and charges on

seeds in carloads from points in California, Idaho, Oregon and Washington to Twin Falls, Idaho, there stopped in transit, and subsequently forwarded to destinations in Florida, Indiana, Michigan, Missouri, New York, Tennessee and Wisconsin, alleging that said rates and charges were inapplicable, unjust and unreasonable, and requesting the said Commission to determine the applicable and lawful rates, and award reparation. Said proceedings related to the nine shipments referred to herein as well as five others not connected with the case at bar.

XII.

That on the 19th day of January, 1955, the plaintiff instituted this action against the defendant for the recovery of the amounts set forth herein and after summons and complaint were served on the defendant, and inasmuch as the charges set forth in plaintiff's said complaint were being investigated by the Interstate Commerce Commission, the parties hereto through their respective counsel stipulated that the defendant could have twenty days from and after the decision of the Interstate Commerce Commission in which to plead to plaintiff's complaint, and upon this stipulation this Court on January 28, 1955, made and entered an Order in conformity with the Stipulation.

XIII.

That the Interstate Commerce Commission upon the complaint filed with it, referred to above, the presentation of evidence by the parties, and the

consideration of the matter, made its Report and Order on March 27, 1956, wherein the Commission found that the tariff provisions relating to transit privileges involved herein must be observed before the defendant was entitled to transit privileges, that the Corneli Seed Company did not observe them and that the "assailed rates and charges are not shown to have been or to be inapplicable, unjust or unreasonable" and accordingly ordered dismissal of the cause. Said Report and Order of the Commission are attached hereto marked Exhibit "A" and made a part hereof.

XIV.

That after the Report and Order of the Interstate Commerce Commission was made and entered (Exhibit "A") the defendant herein, Corneli Seed Company, Inc., petitioned the Interstate Commerce Commission for reconsideration or further hearing in the matter, which Petition was by the said Commission denied on the 30th day of August, 1956, and that no further proceedings in that matter were taken or had by the said defendant.

XV.

That this Agreed Statement of Facts constitutes submission of the above entitled cause to the Court for decision and judgment as to whether the plaintiff Union Pacific Railroad Company is entitled to recover from the defendant Corneli Seed Company, Inc., the amount prayed for in plaintiff's complaint; that Findings of Fact by the Court are hereby waived.

Dated this 18th day of February, 1958.

/s/ BRYAN P. LEVERICH,
/s/ L. H. ANDERSON,
/s/ E. C. PHOENIX,
/s/ D. A. BYBEE,
Attorneys for Plaintiff.

GREENSFELDER, HEMKER & WIESE,
/s/ By EDW. L. WIESE,
/s/ RALPH R. BRESHEARS,
Attorneys for Defendant.

EXHIBIT "A"

Interstate Commerce Commission

No. 31639[1]

Corneli Seed Company, et al.

v.

Atlantic Coast Line Railroad Company, et al.

Decided March 27, 1956

Served: April 13, 1956.

1. Rates charged on seeds, in carloads, transported in stated circumstances, from points in California, Idaho, Oregon, and Washington, stopped in transit at Twin Falls, Idaho, and reforwarded

[1] This report embraces also 31639 (Sub. No. 1) Same v. Same.

Exhibit "A"—(Continued)

to destinations in Florida, Indiana, Michigan, Missouri, New York, Tennessee and Wisconsin, found applicable and not shown to have been or to be unjust or unreasonable.

2. Routes through Wells, Nev., and over the Union Pacific Railroad to and through Twin Falls, Idaho, for seeds, in carloads, transited at Twin Falls, from origins in California on the lines of the Southern Pacific Company to the same destinations, found to be impracticable routes, and established routes through Portland, Oregon, found not unreasonably long.
3. Complaints dismissed.

William E. Rosenbaum for complainants.

Charles W. Burkett, Jr., W. H. Fitzpatrick and William P. Higgins for defendants.

REPORT OF THE COMMISSION

Division 2, Commissioners Freas, Winchell, and Murphy.

By Division 2:

The modified procedure was followed. Exceptions were filed by the complainants and the defendants replied. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

The complainants are corporations engaged in the growing, processing and wholesaling of seeds. In the title complaint, filed October 1, 1954, it is al-

Exhibit "A"—(Continued)

leged that the rates [2] charged on seeds, in carloads, from points in California, Idaho, Oregon and Washington to Twin Falls, Idaho, there stopped in transit, and subsequently forwarded to destinations in Florida, Indiana, Michigan, Missouri, New York, Tennessee, and Wisconsin were inapplicable and that the rates and charges thereon were and are unjust and unreasonable. In a supplemental complaint, No. 31639 (Sub-No. 1), filed November 29, 1954, the same complainants allege further that the routes available for seed traffic from origins on the lines of the Southern Pacific Company to the eastern destinations via Twin Falls were and are unreasonably long and that rates and charges, assailed in No. 31639, were and are, unjust and unreasonable. We are asked to prescribe new routes, determine the applicable and lawful rates, and award reparation.

The seeds consist of shelled corn, dried beans and peas, all of which were stopped in transit for cleaning, drying, grading, inspection, mixing, milling, packing, sacking, sorting, splitting, storing or weighing. The charges were paid on the shipments from points of origin to Twin Falls, where they were recorded for transit. When the seeds were subsequently reforwarded, charges on the shipments embraced by the complaints were billed at the applicable rates from Twin Falls to final des-

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[2] Rates and additions thereto are herein stated per 100 pounds and do not include the general increases authorized in Ex Parte No. 175.

Exhibit "A"—(Continued)

tinations. The combinations of the rates to and from Twin Falls exceeded the respective single-factor through rates from the points of origin to the destinations plus the applicable transit charge. The latter basis is sought.

The transit privileges were and are maintained at Twin Falls on shipments over the route through Huntington, Oreg., embracing the line of the Union Pacific Railroad Company from this point, subject to a 4.5-cent out-of-line charge for the haul over this line between Minidoka, Idaho, and Twin Falls. The transit tariff provides for this charge for a maximum out-of-line haul of 250 miles. Routes are provided from origins on the Southern Pacific to eastern destinations via Ogden, Utah. Out-of-line service from Ogden to Granger, Wy., through Twin Falls exceeds 400 miles. The defendants assert that the Portland route was established to afford transit benefits to seed processors at all points across Idaho. An extensive list is given of seed concerns at 26 points in this State.

Rules and regulations of the applicable transit tariff provided that when shipments are forwarded from the transit station, unexpired inbound freight bills, which have been recorded, or tonnage credit slips must be surrendered and canceled; that the outbound bill of lading or shipping order must have inserted thereon the weight, point of origin, and date of each inbound shipment covering the commodities forwarded and that the transit rate will not apply if shippers fail or decline to comply

Exhibit "A"—(Continued)

with all rules and regulations. These provisions are similar to those in tariffs effective at points within Pacific coast, intermountain, and western trunkline territories.

For several years, beginning at least as early as January 5, 1944, the complainants complied with the tariff provisions above stated and obtained the benefit of the single-factor rates through Huntington plus the out-of-line charge. Notations of points of origin on the bills of lading forwarded to consignee disclosed the approximate sources of supply, which enabled the complainants' customers to locate the producers and buy directly from them. A new claim procedure was thereupon instituted by the complainants for the recovery of the excess in the combination rates. For example, the first overcharge claim under this procedure, filed on March 16, 1949, pertained to an outbound shipment billed February 28, 1949. Attached to the claim were a copy of the bill of lading for the outbound shipment, a memorandum bill marked "for transit consideration only," which contained inbound references, and a statement showing a computation of the difference between the charges. This claim procedure and settlement, not authorized by the applicable transit tariff, apparently was followed for several years. On December 15, 1953, the accounting department of the Union Pacific notified Corneli Seed Company, Inc., that such claim settlements are not authorized and presented bills covering nine claims previously paid, aggregating $3,-

Exhibit "A"—(Continued)

443.50. The claims had been paid during June, 1953. Corneli Seed Co., Inc., under date of January 6, 1954, filed five additional overcharge claims, aggregating $1,317.48. These claims were declined.

The inbound shipments embraced by the 14 claims were billed on and between November 10, 1952, and November 24, 1953. The applicable rates to Twin Falls during this period were: 38 cents on corn from Caldwell, Idaho; 45 cents on beans from Nampa, Idaho; 63 cents on peas from Dishman and Spokane, Wash.; 79 cents on peas from Athena, Oreg.; 127 cents on beans from Irvine, Calif., and 141 cents on beans from Spence and Ventura, Calif. Rates applicable from Twin Falls to representative destinations were: 99 cents on beans and peas to St. Louis, Mo.; 113 cents on peas and 105 cents on corn to Oostburg, Wis.; 148 cents on peas and beans to Bay City, Mich., Green, N. Y., and La Vergne, Tenn., and 121.5, 198 and 172 cents, respectively, to the same destinations, on corn; and 154 cents on beans and 159.5 cents on corn to Belle Glade, Fla.

Differences between the combination rates charged and the corresponding single-factor rates are given as follows: From Dishman to St. Louis, a combination of 162 cents was charged, 40 cents more than the single-factor rate of 122 cents. From Dishman to Oostburg and Bay City, single-factor rates of 129 and 148 cents are 47 and 63 cents less than the respective combinations. The combinations from Caldwell to several points are 38

Exhibit "A"—(Continued)

cents more than the single-factor rates. Other differences shown range from 38 to 63 cents; shipments of beans from California points, reforwarded to Belle Glade, and La Vergne after stops at Twin Falls are not included. Because of routing restrictions, only one shipment would have been entitled to the through rate. That shipment originated at Ventura and was routed via Portland, Oreg., to Twin Falls. The rate on the inbound movement was 141 cents and the rate on the outbound movement to La Vergne was 148 cents. The latter factor is the same as the through rate from Ventura to La Vergne.

The shipment from Spence moved via "SP-Ogden-U.P." to Twin Falls. A shipment from Irvine "originated on AT&SF and moved via San Bernardino, Calif., U.P.R.R.". For the out-of-line haul through Twin Falls no out-of-line charge was provided. The combination rates were applicable.

The complainants point out that the Southern Pacific and Union Pacific have an interchange point at Wells, Nev., which is south and somewhat west of Twin Falls, and contend that there is justification for routes from origins on the lines of the Southern Pacific to Wells, thence Union Pacific through Twin Falls to eastern points. The tariff naming the through rates on beans, peas and seeds from California points on the Southern Pacific, with the exception of certain points not here pertinent, provided and provide for application over routes embracing the Union Pacific with inter-

Exhibit "A"—(Continued)

change at Colton, Calif., Ogden or Portland, Oreg.

Distances from Sacramento, Calif., through Twin Falls to Kansas City, Mo., over routes requiring interchange between the Southern Pacific and Union Pacific at Wells, Ogden, and Portland are shown by the complainant to be 1990.7, 2293.5 and 2663.6 miles, respectively. Twin Falls is not an intermediate point on the established through routes. Distances over the through commodity-tariff routes from Ventura to Omaha are shown by the defendants to be 1,877, 2,141 and 2,867 miles via the Colton, Ogden and Portland interchange routes, respectively. On none of these routes is Twin Falls an intermediate point. The distance over the route through Wells and Twin Falls, sought by complainants, is shown to be 2,275 miles between the same points. The defendants explain that the Portland route was established to meet competition with the Northern Pacific Railway Company, which also interchanges traffic with the Southern Pacific at Portland.

One of the complainants' witnesses in rebuttal testimony, disagreed with mileage evidence of defendants for the reason that the aggregate distances shown failed to include the miles into and out of Twin Falls and submitted adjusted figures including such out-of-line movements. The defendants filed a motion to strike this testimony although the comparison presented by complainants' revisions is repetitious in that it is similar to the original comparison of the routes from Sacramento to

Exhibit "A"—(Continued)

Kansas City, shown above, it is nevertheless material which may properly be included in a rebuttal statement. The motion to strike this evidence is overruled.

It is contended by the complainants that service over the route through Wells, as compared with the Portland route, would be better and more economical. Average car-miles per day for all class I railroads and for one of complainants' shipments over the Portland route are divided into the distance to Twin Falls, in order to determine the number of days that would be saved by movement through Wells. Distance is not the only factor to be considered in the determination of time saved. The volume of main-line traffic is shown to be many times the volume of traffic on the Wells branch. The complainants attempted to show the number of carloads of seeds handled at Twin Falls over an extended period without a showing of the number that might have advantageously been moved if the desired route through Wells had been available. A motion by the defendants to strike this new evidence and other new evidence in the complainants' reply is granted.

The distance from Wells to Granger, over the Wells branch through Twin Falls is 454.7 miles which is 133.5 miles longer than the direct route from Wells to Granger through Ogden. From Wells via Ogden to and through Twin Falls, with the back-haul, and on to Granger the distance is 758 miles which is 304.3 miles longer than the dis-

Exhibit "A"—(Continued)

tance from Wells to Granger over the Wells branch through Twin Falls.

The position is taken by the Union Pacific that difficult and costly operations on the Wells branch warrant non-use thereof for the transportation through Twin Falls of the traffic transited at that point. From Wells to Minidoka, 58.9 miles beyond Twin Falls, there are 38.3 miles of curved track with a total curvature of 4,640 degrees, equivalent to one complete circle for each 14.16 miles of track, there are ascending and descending grades exceeding 0.5 per cent on 110 miles of track, there is frequent need for additional diesel units obtained from Pocatello, Idaho, snow drifts in cuts during the winter ranged up to 20 feet deep which required a work train with a rotary plow, and snow plows placed on the front of engines make it necessary to reduce the number of cars per engine that ordinarily can be moved. It is not shown that the unusual costs entailed result in a greater total to Granger than the cost of transporting traffic 304.3 additional miles over the back-haul route through Ogden which includes the costly operation between Minidoka and Twin Falls. As hereinbefore indicated, the route from Sacramento through Portland is 672.9 miles longer than the route via Wells and Twin Falls.

Of the 14 claims involved in these proceedings, only 2 including commodities which moved inbound to Twin Falls from origins in California. The treatment accorded the California shipments is ex-

Exhibit "A"—(Continued)

actly the same as that rendered shipments moving inbound from points in Oregon, Washington, and Idaho. Under the circumstances presented in these proceedings we are not disposed to open a route embracing the Wells Branch.

The complainants' manager at Twin Falls testified that he personally handled all shipping transactions; that his office was not furnished a copy of the transit tariff for guidance until January 18, 1954. The nine claims paid by defendants were dated April 15, 1953. No one indicated that the claim procedure was not applicable during the eight-month period before December 15, 1953. Departure from the rules and regulations of the published tariff were not justified even though the claim procedure may have been approved by an agent of the defendants. The tariff provisions must be observed.

A letter from the auditor of the Union Pacific dated December 15, 1953, requesting remittance for the amounts paid on the nine claims, was made a part of the record. It was stated therein that on the shipments covered by the claims, freight bills for the movements into Twin Falls were not surrendered and the bills of lading did not show weight, point of origin or date of inbound shipments of commodities forwarded. There was no affirmative representation that inbound freight bills were surrendered at the time shipments subject to the 14 claims were reforwarded from Twin Falls.

Exhibit "A"—(Continued)

Photostats of the outbound bills of lading do not disclose the required inbound references.

Two bills of lading forms have been and are used by the Union Pacific at Twin Falls. Although the complainants find this confusing, it is readily apparent, upon a cursory comparison, that form 1597 is for transited shipments. On the face of the bill of lading, under "Inbound Reference", eleven lines are made available for entry of transit information. Form 1591 is for shipments originated at Twin Falls and was used for all outbound shipments covered by the claims. Form 1597 was used for the complainants' shipments as early as 1944 and is currently being so used. Selection of the forms appears to have been consistent with the objective and intentions of the complainants.

Each form comes in a packet with sheets of carbon interleaved among the various documents and copies. The original bill of lading is the top sheet in each packet and the shipping order follows the first sheet of carbon. Apparently the forms are provided to shippers for the simultaneous entry of common information. This procedure saves time and eliminates the possibility of transcription errors.

It is customary for carriers to rely upon shipping orders and representations of shippers, but in the event of inconsistencies or incompleteness an inquiry or investigation is necessary. The pertinent title in the transit tariff, titled "shipping directions", reads as follows:

Exhibit "A"—(Continued)

The bill of lading or shipping order must have inserted thereon the weight, point of origin and date of each inbound shipment covering the commodities forwarded.

It is proper and reasonable to make compliance with this rule a condition precedent to the application of the single-factor rate. Information otherwise given to, or actual knowledge by, the carrier's agent does not excuse shippers from compliance with this rule. No defects in the bills of lading issued are referred to, except the omission of inbound references, which it was incumbent upon the complainants to furnish. The complainants contend that the carriers are responsible for preparation of bills of lading, and that the Union Pacific had notice that transit privileges were desired and should have requested the inbound data and documents. Shippers are charged with knowledge of, and have the duty to comply with tariff provisions even though they be misled by the carriers as to the requirements thereof.

Attention is invited by the complainants to the report of division 3 in Southern Cotton Oil Co. vs. Atlanta, B.&C. R. Co., 270 I.C.C. 777. The applicable transit tariff therein made the claim procedure available, but required that the shipper endorse on the outbound bills of lading that transit privileges have been accorded and claim will be filed. Inadvertently the endorsements were not made. Upon the particular facts of record in that proceeding the applicable combinations were found

Exhibit "A"—(Continued)

unreasonable to the extent they exceeded corresponding joint rates with transit. The endorsement provision was subsequently canceled as unnecessary. The importance of the freight rates under control governed by regulations of the Commodity Credit Corporation and Office of Price Administration was a consideration and furthermore, in a special-docket application (which had been denied) the defendants admitted that their agent contributed to the complainants' inadvertence by failure to call attention to the omissions.

That the Commission would be warranted in granting defendant permission to waive collection of undercharges in this proceeding is further demonstrated, say complainants, by statements made in Hygrade Food Products Corp. v. Baltimore & O. R.R. Co., 292 I.C.C. 638, 641. Two transit origins were eliminated in the revision of a tariff item. The evidence indicated that the elimination was unintentional and the origins were later restored. Several proceedings were cited therein where on similar facts, the failure to provide transit during such intervals was found to be an unreasonable practice. It was observed that "the Commission does not look with favor upon the retroactive application of transit privileges, except where the showing made warrants a finding of unreasonableness of the charges assailed." The applicable rates were found unjust and unreasonable, but it was also noted that the defendants therein had failed to call attention to routing inconsisten-

Exhibit "A"—(Continued)

cies in the bills of lading. The shipper routing was impossible of execution under the transit tariff and the bills of lading contained a notation "in transit for processing."

In this proceeding, the omissions of essential information were not inadvertent.

Transit arrangements historically have been a source of discrimination. Uniform rules and regulations in effective tariffs, are a necessary step in affording equal opportunities to all shippers operating under like circumstance. Constant policing by the carriers is necessary to prevent abuses of the privileges. The rules and regulations assailed have been in effect over a long period of time at many transit points. It may be assumed that they have played an essential part in the maintenance of equality of charges for competing transit operators.

On the question of the establishment of a tariff provision which will in the future enable transit operators to conceal origin points on outbound bills and secure the benefit of through rates, one of the complainants' witnesses testified generally that shippers of grain and grain products are protected in this respect where reshipping and proportional rates are maintained. Such rates are maintained only in special circumstances. Obviously, the desired claim procedure offers opportunities for irregularities which are minimized by the established transit rules. It would impose greater administrative obligations on the defendants in policing transit

Exhibit "A"—(Continued)

arrangements and making repayments based on the through single-factor rates, and has no sound evidentiary support.

We find that the assailed rates and charges are not shown to have been or to be inapplicable, unjust or unreasonable.

We further find that because of the difficult operating conditions on the line of the Union Pacific north of Wells, routes embracing this line, as sought, are impracticable for the transportation of the traffic from California origins to destinations east of Granger, and that the established routes via Portland, maintained for the transportation thereof are not unreasonably long.

An order dismissing the complaints will be entered.

Murphy, Commissioner, dissenting in part:

The complainants, California shippers of seeds, are seeking a shorter, more reasonable route over which stoppage in transit at Twin Falls, Idaho, will continue to be available. It is their thesis that the present route via the interchange point of Portland, Oreg., with a transit stop available at Twin Falls, is unreasonably long. From Sacramento, Calif., for example, a route 672.9 miles shorter is possible if interchange of such traffic were arranged by the Southern Pacific with the Union Pacific at Wells, Nev.

No issue has been raised by the defendants as to the adequacy of the interchange facilities at

Exhibit "A"—(Continued)

Wells. The complainant refers to the Railway Equipment Register to show that Wells is a junction where traffic can be interchanged without transfer of lading. This, the defendants do not deny. Moreover, an inspection of the tariffs indicates that for some kinds of traffic, not transcontinental traffic, routes via Wells are maintained.

The only real question before us is whether the sought route is practicable. The defense urges that the route via Wells is not a practicable transcontinental route because of curves, grades, and weather on the line north of Wells. Conceding the costliness and difficulty involved in operating through this mountainous terrain, it is likewise true that equivalent costs and operating difficulties are encountered over the present route, involving as it does movement off the main line from Minidoka, Idaho, for stoppage in transit at Twin Falls, and backhaul therefrom.

In the circumstances the sought route appears to be every bit as practicable as the present routes. With reference to the existing routes, the Southern Pacific distances to Portland are somewhat shorter than to Wells, but via the sought route, the distance over the Union Pacific from Wells would be hundreds of miles shorter than the distance from Portland and would involve no backhaul. Consequently by reason of greater efficiency and economy of operation a commensurately greater profit should result to the Union Pacific as its share of the joint through rate than it now receives from

Exhibit "A"—(Continued)

traffic hauled via Portland hundreds additional miles out of the way.

Balancing advantages against disadvantages, it seems to me that the sought route is practicable, that the defendants' cost of operation and operating revenues thereover could reasonably be expected to improve, and that the complainants would be greatly convenienced if the sought route were utilized. On this record the sought route through Wells with transit stop at Twin Falls should be found desirable in the public interest and needed to provide adequate, more economic, transportation service.

ORDER

At a Session of the Interstate Commerce Commission, Division 2, held at its office in Washington, D. C., on the 27th day of March, A.D. 1956. No. 31639. Corneli Seed Company, et al., vs. Atlantic Coast Line Railroad Company, et al.

No. 31639 (Sub-No. 1)

These proceedings being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

Exhibit "A"—(Continued)

It is ordered, That the complaints in these proceedings be, and they are hereby, dismissed.

By the Commission, division 2.

[Seal] HAROLD D. McCOY,
Secretary.

[Endorsed]: Filed February 18, 1958.

[Title of District Court and Cause.]

MINUTE ENTRY

February 18, 1958

(Judge Taylor)

Oral argument having been waived in this case, it is ordered that the matter be submitted on briefs, plaintiff to have 15 days from today to file opening brief, defendant 15 days following to answer, and plaintiff the following 10 days to reply.

[Title of District Court and Cause.]

MEMORANDUM OPINION

This action was commenced January 19, 1955, by the plaintiff, Union Pacific Railroad Company, a Utah corporation, to recover the sum of $3,433.50, with interest from July 2, 1953. There is no dispute that $127.74 of this amount is due and owing

the plaintiff The remaining sum of $3,315.76 was paid to the defendant, Corneli Seed Co., Inc., an Idaho corporation, by the plaintiff upon claims made by the defendant for alleged overcharges made on nine (9) carloads of beans, peas, and shelled corn shipped from Twin Falls, Idaho.

Since proceedings were being instituted by the defendant before the Interstate Commerce Commission to determine the applicability of the tariff provisions upon which the instant action is based as applied to fourteen (14) shipments (of which the nine (9) shipments here involved were a part), it was stipulated that the defendant's time to answer would be extended until twenty (20) days after the decision of the Interstate Commerce Commission was rendered. The Interstate Commerce Commission made its decision and thereafter the defendant answered. The matter has now been submitted to the Court on an agreed Statement of Facts.

From the agreed Statement of Facts it appears that the nine (9) carloads of beans, peas, and corn were shipped from points of origin in California, Oregon, and Washington, to a transit station at Twin Falls, Idaho, where the seeds were stopped for processing. After processing the seeds were shipped on to their final destination.

It is stated in the agreed Statement of Facts that:

"That the rules and regulations of the transit tariff of the plaintiff applicable to the shipments involved herein provided that when shipments are

forwarded from the transit station, in this case Twin Falls, Idaho, unexpired inbound freight bills which had been recorded, or tonnage credit slips must be surrendered and cancelled; that the outbound bills of lading or shipping orders must have inserted thereon the weight, point of origin, and date of each inbound shipment covering the commodities forwarded and that the transit rate would not apply if shippers fail or decline to comply with all such rules and regulations; * * *"

The defendant had complied with the tariff rules and regulations, set out in substance above, for several years during and subsequent to 1944, and received the benefit of the transit or single-factor rate. By use of the information contained on the outbound bill of lading the defendant's customers began dealing directly with the defendant's sources of supply with a resultant loss of business to the defendant. To stop this loss the defendant's local representative adopted the practice of making shipments out of the transit point (Twin Falls) by using the regular forms of bills of lading used for shipments not entitled to transit privileges. These bills of lading did not show the information previously shown in compliance with the transit tariff rules and regulations. Then to secure the transit rate the defendant's representative filed with the plaintiff overcharge claims, attaching thereto copies of the bill of lading for the outbound shipment, a memorandum bill marked "for transit consideration only", which contained inbound references, and a statement showing a computation of the differ-

ence between the transit rate and the combination rate. Pursuant to this practice claims were paid by the plaintiff, through and including the claims made on the nine (9) shipments for which the plaintiff seeks recovery. Thereafter the practice was stopped and the instant action commenced to recover the amounts paid to defendant on its claims for alleged overcharges on the nine (9) shipments here in question.

In its report and order dismissing the defendant's complaint the Interstate Commerce Commission found, in effect, that the procedure followed by the defendant was not in compliance with the tariff rules and regulations relating to transit privileges; that the procedure specified by the tariff rules and regulations had to be observed before the defendant was entitled to transit privileges. It was found in the said report that, "It is proper and reasonable to make compliance with this rule a condition precedent to the application of the single-factor rate."

Duly filed tariffs bind both carrier and shipper with the force of law. Lowden v. Simonds-Shields-Lonsdale Grain Co., 59 S. Ct. 612; 306 U. S. 516. The shipper is conclusively presumed to know the proper tariff rates. Pettibone v. Richardson, 7 Cir., 126 F. 2d 969. No estoppel can arise against the carrier nor can a waiver be made by the carrier to prevent the collection of the applicable tariff rate; and law requires the railroad to charge and collect the applicable rates. Davis v. Henderson, 45 S. Ct. 24, 266 U. S. 92; Pittsburgh, C., C.&St.L.

Ry. Co. v. Fink, 40 S. Ct. 27, 250 U.S. 577; West Coast Products Corp. v. Southern Pacific Co., 9 Cir., 226 F. 2d 830.

These matters of law do not appear to be contested by the parties. It is apparently the contention of the defendant that the procedure followed in regard to the shipping of the nine (9) carloads of seed was such a substantial compliance with the tariff rules and regulations here involved as to entitle the defendant to the single-factor or transit rate; and that the Court can determine this question as a matter of law.

Assuming, without deciding, that this Court is not bound by the Interstate Commerce Commission's determination, never the less, this Court is in agreement.

In Chicago & N. W. R. R. Co. v. Connor Lumber & Land Co., 7 Cir., 212 F. 2d 712, 717, it is stated:

"It appears that, as to all inbound shipments involved herein, defendant originally desired to and did avail itself of the transit rates plan set up by the aforesaid tariff. It thereby became obligated, in order to obtain the concession of such lower through rates to comply with every pertinent provision of the tariff imposing duties upon it as a shipper."

The Interstate Commerce Commission has held that the tariff rules and regulations here involved to be reasonable and proper. The language of the said tariff rules and regulations is specific and mandatory as to what must be done by the shipper

in order to secure the single-factor or transit rate. These things were not done by the defendant.

It appears from the report of the Interstate Commerce Commission that the difference between the procedure followed by the defendant in regard to the nine (9) carloads of seed here involved and that specified in the tariff rules and regulations amounts to more than a mere matter of form. It is stated on page 12 of the Interstate Commerce Commission Report and Order that:

"Transit arrangements historically have been a source of discrimination. Uniform rules and regulations in effective tariffs, are a necessary step in affording equal opportunities to all shippers operating under like circumstance. Constant policing by the carriers is necessary to prevent abuses of the privileges. The rules and regulations assailed have been in effect over a long period of time at many transit points. It may be assumed that they have played an essential part in the maintenance of equality of charges for competing transit operators."

Again on page 12 it is stated:

"Obviously, the desired claim procedure offers opportunities for irregularities which are minimized by the established transit rules."

Accordingly, it is the conclusion of the Court that the procedure followed by the defendant in shipping the nine (9) carloads of beans, peas, and shelled corn was not a compliance with the terms of the tariff regulations so as to entitle the defendant to transit privileges.

Plaintiff is therefore entitled to judgment against defendant for the sum of $3,433.50, together with interest thereon from July 2, 1953, to the date of judgment herein.

Dated this 11th day of April, 1958.

/s/ FRED M. TAYLOR,
U. S. District Judge.

[Endorsed]: Filed April 11, 1958.

In The United States District Court for the District of Idaho, Southern Division

No. 3148

UNION PACIFIC RAILROAD COMPANY, a corporation, Plaintiff,

vs.

CORNELI SEED COMPANY, INC., a corporation, Defendant.

JUDGMENT

This cause having been heretofore submitted to the Court upon an Agreed Statement of Facts with Briefs of the parties, Findings of Fact being waived, and the same having been considered and it appearing that the issues herein should be found for the plaintiff and that it should have judgment as demanded in its complaint, being in the sum of Three Thousand Four Hundred Forty-three and 50/100ths Dollars ($3,443.50), with interest at 6% from July 2nd, 1953.

It Is Therefore Ordered and Adjudged that the plaintiff, Union Pacific Railroad Company, have and recover of and from the defendant, Corneli Seed Company, Inc., the sum of $3,443.50 principal, and the sum of $990.58 as interest, or a total sum of $4,434.08, plus costs taxed in the amount of $37.00, with interest on said judgment at the rate of 6% per annum, and that plaintiff have execution therefor.

Dated, April 14th, 1958.

/s/ FRED M. TAYLOR,
District Judge.

Entered: April 14, 1958.

[Endorsed]: Filed April 14, 1958.

[Title of District Court and Cause.]

MEMORANDUM OF COSTS AND DISBURSEMENTS

Clerk's Fee	$15.00
Marshal's Costs	2.00
Attorney's Docket Fee	20.00
	$37.00

State of Idaho,
County of Bannock—ss.

Costs taxed this 21st day of April, 1958, in the amount of $37.00.

L. H. Anderson, being first duly sworn, deposes and says:

That he is one of the attorneys for the Plaintiff, Union Pacific Railroad Company, in the above entitled action, and as such is better informed relative to the above costs and disbursements than the said plaintiff; that to the best of his knowledge and belief the items in the above Memorandum contained are correct, and that said disbursements have been necessarily incurred in said action.

/s/ L. H. ANDERSON,

Subscribed and sworn to before me this 15th day of April, 1958.

[Seal] /s/ ROSA ENKE,
Notary Public for Idaho, Residing at: Pocatello, Idaho.

[Endorsed]: Filed April 15, 1958.

[Title of District Court and Cause.]

NOTICE TO TAX COSTS

To: Ralph R. Breshears and Greensfelder, Hemker & Wiese, Attorneys for the Above Named Defendant:

Please Take Notice that Plaintiff's Memorandum of Costs filed herein April 15, 1958, a copy of which is attached hereto, will be presented to the Clerk of the above entitled Court for taxation, at his office in the Federal Building, in the City of Boise, Idaho, on the 21st day of April, 1958, at ten o'clock

in the forenoon of that day.

Dated, April 15, 1958.

/s/ BRYAN P. LEVERICH,
/s/ L. H. ANDERSON,
/s/ E. C. PHOENIX,
/s/ D. A. BYBEE,
Attorneys for Plaintiff.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 15, 1958.

[Title of District Court and Cause.]

DEFENDANT'S MOTION FOR NEW TRIAL AND TO AMEND JUDGMENT ENTERED APRIL 14, 1958

Comes now the defendant in the above cause within ten days of April 14, 1958, the date of entry of judgment in this cause, and moves the Court to grant unto defendant a new trial herein and to amend the judgment herein entered April 14, 1958, by striking from the first paragraph thereof the following:

> "in the sum of Three Thousand Four Hundred Forty-three and 50/100ths Dollars ($3,443.50), with interest at 6% from July 2nd, 1953."

and inserting in lieu thereof:

> "in the sum of $127.74 with interest at 6% from July 2, 1953"

and by striking from the second paragraph thereof the following:

> "the sum of $3,443.50 principal, and the sum of $990.58 as interest, or a total sum of $4,434.08, plus costs taxed in the amount of $....."

and inserting in lieu thereof the following:

> "the sum of $127.74 principal and the sum of $36.64 as interest or a total sum of $164.38 plus costs taxed in the amount of $....."

for the following reasons:

1. Under the Agreed Statement of Facts, the judgment in favor of plaintiff is erroneous as a matter of law and should have been in favor of defendant.

2. The Court erroneously misconstrued and misapplied statements of fact and ignored statements of fact contained in the agreed statement of facts.

3. The Court erroneously failed to hold as a matter of law that defendant complied with the tariff provisions in question and that plaintiff was entitled to the benefit of the transit tariff on the shipments in question.

4. The Court erroneously concluded that the procedure followed by defendant was not a compliance with the terms of the tariff regulations in question so as to entitle defendant to transit privileges.

5. The Court erroneously followed the determination of the Interstate Commerce Commission.

6. The findings contained in the memorandum

opinion of the Court and the judgment are erroneous as a matter of law under the record in this cause.

Wherefore, defendant prays that defendant be granted a new trial herein and that the judgment herein be amended in the respects hereinabove set out.

GREENSFELDER, HEMKER
& WIESE,
/s/ By EDWARD L. WIESE,
/s/ RALPH R. BRESHEARS,
Attorneys for Defendant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 22, 1958.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated, by and between the parties hereto through their respective counsel, that Defendant's Motion for New Trial and to Amend Judgment Entered April 14, 1958, heretofore filed herein, be submitted on briefs and that the plaintiff in the above-entitled case may have until May 6th, 1958, in which to file a reply to the memorandum in support of defendant's motion, which memorandum has been filed, and that the defendant may have fifteen days from and after the date of receipt of a

copy of said reply memorandum in which to reply to said reply memorandum.

Dated this 28th day of April, 1958.

/s/ BRYAN P. LEVERICH,
/s/ L. H. ANDERSON,
/s/ E. C. PHOENIX,
Attorneys for Plaintiff.

GREENSFELDER, HEMKER & WIESE,
/s/ By EDWARD L. WIESE,
/s/ RALPH R. BRESHEARS,
Attorneys for Defendant.

ORDER

Upon reading the above stipulation, good cause appearing therefor, It Is Ordered that Defendant's Motion for New Trial and to Amend Judgment Entered April 14, 1958, be submitted on briefs, that the plaintiff have until May 6th, 1958, to file a memorandum or reply to the memorandum in support of Defendant's Motion for New Trial and to Amend Judgment, and that defendant have fifteen days from and after receipt of a copy of plaintiff's reply memorandum or brief in which to reply thereto.

Dated this May 29th, 1958.

/s/ FRED M. TAYLOR,
District Judge.

[Endorsed]: Filed April 29, 1958.

[Title of District Court and Cause.]

ORDER

This case was submitted to the Court on an agreed statement of facts. In its memorandum opinion filed on April 11, 1958, the Court found for the plaintiff, Union Pacific Railroad, and on April 14, 1958, judgment was entered. On April 22, 1958, the defendant, Corneli Seed Co., Inc., filed a "Motion for New Trial and to Amend Judgment Entered April 14, 1958." This motion, by stipulation of counsel, was submitted to the Court on briefs.

After a consideration of defendant's Motion and the briefs of counsel, it is this Court's conclusion that the original opinion and judgment are correct.

Accordingly, it is Ordered that defendant's motion be, and the same is hereby denied.

Dated this 2nd day of June, 1958, at Pocatello, Idaho.

/s/ FRED M. TAYLOR,
United States District Judge.

[Endorsed]: Filed June 2, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that defendant, Corneli Seed Company, Inc. hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment in this cause entered on April 14,

1958, in the United States District Court for the District of Idaho, Southern Division. A motion for new trial and to amend said judgment was timely filed April 22, 1958, and by order entered June 2, 1958 denied. This appeal is taken within thirty days after the denial of said motion in compliance with Federal Rule 73.

CORNELI SEED COMPANY, INC.,
Appellant,
/s/ By EDWARD L. WIESE,
/s/ FORREST M. HEMKER,
Attorneys for Appellant.

[Endorsed]: Filed June 25, 1958.

[Title of District Court and Cause.]

APPEAL BOND

Know all men by these presents, that we, Corneli Seed Company, Inc., as principal, and Hartford Accident and Indemnity Company, a corporation, of Hartford, Connecticut, as surety, are held and firmly bound unto Union Pacific Railroad Company in the sum of $5,000, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The condition of the above obligation is such that whereas Union Pacific Railroad Company has in the United States District Court for the District of

Idaho, Southern Division, in the above-entitled cause therein pending recovered a judgment against the said Corneli Seed Company, Inc.; and whereas the above-named appellant has according to law, taken an appeal from the said judgment.

Now, Therefore, if the said appellant shall satisfy the said judgment in full together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed and satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, or if the said judgment be set aside, then this obligation shall be void; otherwise to remain in full force and effect.

Sealed with our seals and dated at St. Louis, Missouri, this 20th day of June, 1958.

[Seal] CORNELI SEED COMPANY, INC., a corporation,
/s/ By EDWARD PAGE, Pres.,
Principal.

[Seal] HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,
/s/ By JOSEPH M. O'DAY,
Surety.

Approved: June 26, 1958.

/s/ FRED M. TAYLOR,
U. S. District Judge.

State of Missouri,
City of St. Louis—ss.

I, Carl A. J. Miller, a Notary Public in and for the said City, in the State aforesaid, do hereby certify that Joseph M. O'Day, who is personally known to me to be the same person who signed the above and foregoing instrument as the Attorney-in-Fact for the Hartford Accident and Indemnity Company, appeared before me this day in person and acknowledged that he signed the name of the Hartford Accident and Indemnity Company thereto, as his Principal, and his own name as Attorney-in-Fact as the free and voluntary act of his said Principal for the uses and purposes therein set forth, and that he executed the said instrument under authority given him by his said Principal.

Given under my hand and Notarial seal, this 20th day of June, A. D. 1958.

[Seal] /s/ CARL A. J. MILLER,
Notary for the County of St. Louis which adjoins the City of St. Louis. My commission expires June 11, 1959.

Power of Attorney Attached.

[Endorsed]: Filed June 25, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP):

1. Complaint
2. Summons with return thereon
3. Stipulation and order re: defendant to plead
4. Answer of defendant
5. Agreed statement of facts, with Exhibit A attached
6. Minutes of the court of February 18, 1958
7. Defendant's interrogatories to plaintiff
8. Memorandum Opinion
9. Judgment (Entered April 14, 1958)
10. Memorandum of costs and disbursements
11. Notice to tax costs
12. Defendant's motion for new trial and to amend judgment
13. Stipulation and order to submit motion for new trial and to amend judgment on briefs
14. Order denying motion for new trial and to amend judgment
15. Notice of appeal
16. Appeal bond
17. Designation of contents of record on appeal.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court this 11th day of July, 1958.

[Seal] ED. M. BRYAN,
Clerk,

/s/ By LONA MANSER,
Deputy.

[Endorsed]: No. 16108. United States Court of Appeals for the Ninth Circuit. Corneli Seed Company, a corporation, Appellant, vs. Union Pacific Railroad Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Southern Division.

Filed: July 14, 1958.

Docketed: July 22, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16108

CORNELI SEED COMPANY, INC., a corporation, Appellant (Defendant).

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation, Appellee (Plaintiff),

APPELLANT'S POINTS TO BE RELIED UPON

Appellee, Union Pacific Railroad Company, brought this action against appellant, Corneli Seed Company, Inc., to recover freight transportation charges allegedly due appellee by reason of its having granted Corneli the through rate freight charges, on the theory that notwithstanding the shipments involved qualified for the through rate, that Corneli was not entitled to same because of its alleged failure to comply with the terms of the transit tariff in failing to make certain notations on bills of lading. Appellant Corneli asserted that there had been a compliance with the terms of the tariff covering the shipments involved in this case.

On an agreed statement of facts, the District Court for the District of Idaho, Southern Division, entered judgment for the appellee, Union Pacific Railroad Company, against the appellant, Corneli Seed Company, Inc. in the amount of $3,443.50

principal and $990.58 interest, a total of $4,434.08 plus costs with interest to run at 6% until satisfaction.

Points on which the appellant intends to rely are as follows:

1. The Court erred in entering judgment for the appellee for as a matter of law under the Agreed Statement of Facts, it appears that the appellant has complied with the transit tariff.

2. The Court erred in holding that the appellant was not entitled to the benefit of the transit tariff for under the law, exact, technical, literal compliance with the terms of transit tariffs is not required where such a compliance leads to an unjust or absurd result. The compliance in this case was sufficient where the shipper, appellant, was and is clearly entitled to the benefit of the through rate, in view of the lack of any discrimination and that the shipments were in truth and in fact transit shipments.

3. The Court erred in misconstruing and misapplying the agreed statement of facts and the judgment in favor of the appellee is erroneous as a matter of law.

4. The Court erred in failing to hold as a matter of law that the appellant complied with the tariff provisions in question and that appellant was entitled to the benefit of the transit tariff on the shipments in question.

5. The Court erred in concluding that the procedure followed by appellant was not in compliance

with the terms of the tariff regulation in question so as to entitle appellant to transit privileges.

6. The Court erred in following the determination of the Interstate Commerce Commission.

7. The Court erred in overruling the appellant's motion for new trial and to amend judgment.

CORNELI SEED COMPANY, INC.,
Appellant,
/s/ By EDWARD L. WIESE,
/s/ FORREST M. HEMKER,
Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 25, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD TO BE PRINTED UNDER THE SUPERVISION OF THE CLERK

Now comes the appellant, defendant, Corneli Seed Company, Inc., and hereby designates for printing under the supervision of the Clerk of this Court, the complete record herein filed including the pleadings, the agreed statement of facts and Exhibit "A" attached thereto; the Memorandum Opinion of the District Court of April 11, 1958, the Judgment of the District Court on April 14, 1958, Appellant's (Defendant's) Motion for a New Trial and to

Amend Judgment filed April 22, 1958, Order of the District Court of June 2, 1958, denying said Motion, Appellant's (Defendant's) Notice of Appeal, Appeal Bond, Order Approving Appeal Bond, this Designation Respecting the Printed Record, the Appellant's Points to be Relied Upon, the transcript of all docket entries and any other items comprising the complete record as filed in this Court. Appellant, defendant deems the complete record material to the consideration of this appeal.

CORNELI SEED COMPANY, INC.,
Appellant,

/s/ By EDWARD L. WIESE,
/s/ FORREST M. HEMKER,
Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 25, 1958. Paul P. O'Brien, Clerk.